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No. 79-1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CONNECTICUT BOARD OF PARDONS, Et Al
Petitioners

v.

DAVID DUMSCHAT
Respondent

JAMES BROWN, STANLEY CZAJA and
JAMES SHELTON
Intervening Respondents

CONNECTICUT BOARD OF PARDONS, Et Al
Petitioners

v.

JAMES BROWN, STANLEY CZAJA and
JAMES SHELTON
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Has the practice of the Connecticut Board of Pardons in reducing the minimum terms of inmates sentenced to life sentences in Connecticut thus accelerating their eligibility to be considered for release to the community by the Connecticut Board of Parole given such inmates after serving an as yet judicially undetermined amount of time, a protected liberty interest such that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that such inmates, when they reach this as yet undetermined point in their sentence, be given written explanations of adverse decisions by the Board of Pardons?

LIST OF PARTIES

This is a class action. The plaintiff class consists of all inmates currently serving sentences of life imprisonment in the Connecticut Correctional Institutions at Somers and Enfield and who have been or will be denied pardons during their current terms of imprisonment of incarceration by the Connecticut Board of Pardons.

The class consists of all so-called "lifers" who are serving what is commonly referred to as a "straight life" sentence. This is a life senetence which contains no court imposed minimum term. The minimum term of such a sentence is determined according to the formula discussed in footnote 1 at page 5, infra.

There is also a group of inmates serving sentences the maximum term of which is life and the minimum term of which as imposed by the sentencing court can be not less than ten (10) nor more than twenty five (25) years. See Section 53a-35(c) (1) Connecticut General Statutes. This latter group of inmates are not parties to this action. These sentencing procedures are the result of statutory changes which are not applicable to these plaintiffs or to the class which they represent.

The defendants consist of the members of the Connecticut Board of Pardons.

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I

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BRIEF FOR PERITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 618 F.2d 216 (1980) and is also printed at pp. 2a-16a in the Petitioners' Appendix to their Petition For a Writ Of Certiorari.

This opinion and judgment of the Second Circuit were rendered following the order of the Supreme Court in *Connecticut Board of Pardons, et al v. David Dumschat, et al*, No.

78-1533, entered on June 11, 1979 which provided as follows:

"The motion of respondents for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. (1979)." See _____ U.S. _____, 99 S.Ct. 2854 (1979). See Petitioners' Appendix to their Petition For a Writ of Certiorari p. 17a.

The previous opinion of the Second Circuit upon which this Court's order of June 11, 1979 was based is reported in 593 F.2d 165 (1979) and appears in the Petitioners' Appendix to their Petition for a Writ of Cetiorari at pp. 18a-20a.

The opinion of the District Court for the District of Connecticut is reported in 462 F. Supp. 509 (1978) and appears in the Petitioners' Appendix to their Petition For a Writ of Certiorari at pp. 21a-25a. Incorporated in its decision is an earlier decision from the District Court in *Dumschat v. Board of Pardons*, 432 F. Supp. 1310 (D.Conn. 1977).

JURISDICTION

The opinion and judgment of the United States Court of Appeals For The Second Circuit were rendered on March 20, 1980. The Petition For A Writ Of Certiorari was filed with this Court on June 18, 1980. The Petition was granted on October 14, 1980. On the same date this Court granted "[t]he motion of the respondents Brown and Czaja for leave to proceed *in forma pauperis*. . ."

This Court's judisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

In February, 1976, David K. Dumschat instituted an action in the District Court for the District of Connecticut claiming in essence, that he had been deprived of a federally protected right within the purview of 42 U.S.C. 1983 because the Connecticut Board of Pardons had, on a number of occasions, denied him a pardon and on no occasion did the Board provide him with a statement of reasons for this denial. Dumschat's claim was that he was entitled to such a statement under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

At that time, Mr. Dumschat was confined in the Connecticut Correctional Institution, Somers, serving a life sentence imposed in 1964 for the crime of murder in the second degree. (See *Dumschat v. Connecticut Board of Pardons*, 432 F. Supp. 1310, 1311 (D. Conn. 1977).

In that action Judge Blumenfeld concluded that ". . .due process attaches to the denial of a pardon to an inmate like Dumschat sentenced to life-imprisonment who has served almost two-thirds of his minimum term." *Dumschat v. Connecticut Board of Pardons*, 432 F. Supp. 1310, 1315n.17 (D. Conn. 1977).

The Court further "conclude[d] therefore that the fourteenth amendment requires that the Connecticut Board of Pardons furnish plaintiff a written statement of reasons and facts relied on when he is denied a pardon."*Dumschat*, supra, p. 1315.

The authority to pardon which is involved is the authority of the Connecticut Board of Pardons under Section 18-26, Connecticut General Statutes, to reduce the minimum term of an inmate including, of course, an inmate serving a life term, thereby accelerating the inmate's eligibility for consideration for release to the community by the Connecticut Board of Parole. (See, *Dumschat v. Board of Pardons, State of Connecticut*, 432 F. Supp. 1310, 1312 (D. Conn. 1977) and the opinion of the Second Circuit following remand, reported in 618 F.2d 216, 217, footnote 1, Petitioners' Appendix to their Petition For A Writ of Certiorari, p. 5a footnote 1).

The Board of Pardons took an appeal to the United States Court of Appeals for the Second Circuit from that judgment.

On June 16, 1977, Dumschat was given relief by the Board of Pardons. The parties agreed that this relief rendered the appeal moot pursuant to *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975); *Holup v. Gates*, 544 F.2d 82 (2d Cir. 1976) cert. denied, 430 U.S. 941, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977).

By order of the Court dated January 12, 1978, the case was remanded to the District Court.

In December, 1977, James Brown, Stanley Czaja and James Shelton, each of whom are also serving life sentences, filed an action in the District Court making the same claims as Dumschat.

As with Dumschat, these three plaintiffs had been denied a pardon without being given a statement of reasons.

Brown is serving a life sentence for murder which was first imposed in 1967. Absent any reduction in his minimum term [1] by the Board of Pardons, he will be eligible for parole in 1987. (Paragraphs 18-19 of the Complaint, Joint Appendix p. 11).

Czaja is serving a life sentence for murder in the second degree which was imposed in 1962. Absent any reduction in his minimum term by the Board of Pardons he will be eligible for parole in 1982. (Paragraphs 28-29, of the Complaint, Joint Appendix p. 13).

Shelton is serving a life sentence for murder in the second degree which was imposed in 1969. Absent any reduction in his minimum term by the Board of Pardons he would have been eligible for parole in 1989. (Paragraphs 38-39 of the Complaint, Joint Appendix, p. 15).

Although it does not appear in the Record, since it occurred after the last evidentiary hearing in the District Court, Shelton's minimum term was reduced by action of the Board of Pardons on October 23, 1978.

The defendants moved in the District Court to vacate its judgment in *Dumschat* and to dismiss as moot. This motion was denied.

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[1]Insofar as these plaintiffs and the class which they represent are concerned, their parole eligibility is governed by those provisions of Sec. 54-125, Conn. Gen. Stat. which, at the time these men were sentenced provided that "Any person . . . if sentenced for life, after having been in confinement under such sentence for not less than twenty-five years, less such time, not exceeding a total of five years, as may have been earned under the provisions of section 18-7, may be allowed to go at large on parole . . . "

So-called "lifers" such as these plaintiffs, absent relief from the Board of Pardons must, therefore serve a minimum of twenty years less "jail time" credit, if applicable, in order to be eligible for parole. *Holmquist v. Manson*, 168 Conn. 389, 362 A.2d 971 (1975).

The plaintiffs in both actions in the District Court were represented by the same counsel. The plaintiffs Brown, Czaja and Shelton filed a Motion to Intervene in *Dumschat*, to consolidate their action with *Dumschat*, and to have the consolidated action certified as a class action.

All of these motions were granted by Judge Blumenfeld.

An additional evidentiary hearing was held in the District Court at which the parties agreed and the Court approved that the record before the Court in *Dumschat* would be included in the record in the consolidated actions then before the Court as well as the record in a previous similar action which became moot after trial but before decision. *Carrona v. John R. Manson, et al.* (D. Conn.). Civil No. H-74-377.

Judge Blumenfeld reached the same conclusion that he had reached in his earlier decision in *Dumschat* and, in addition, went beyond that earlier decision and held that:

> "Therefore, because an inmate's liberty interest is seriously affected by the pardon procedure, I need not 'draw the constitutional line' in the present action.[2] In a pardon hearing of an inmate sentenced to life imprisonment, the Due Process Clause protects the inmate's interest in obtaining reasons for denial of pardon irrespective of the time served on his sentence when his pardon application is considered.
>
> "After hearing the testimony of the present Chairman of the Board of Pardons, it appears that the conditions present at the time of my original decision

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[2]As noted above, Judge Blumenfeld's previous decision was limited to persons sentenced to a term of life imprisonment who have served " . . . almost two-thirds of [their] minimum term."

> on this matter continue to exist without interruption or change. Therefore, in all respect, I adhere to my prior decision in this matter and rule that the Connecticut Board of Pardons furnish any member of the plaintiff class a written statement of reasons and the facts relied on when he is denied a pardon." (See *Dumschat v. Board of Pardons*, 462 F. Supp. 509, 511-12 (D. Conn. 1978), Petitioners' Appendix to Petitioners' Petition For A Writ of Certiorari, p. 25a.

Two judgments were entered in the District Court, one in *Dumschat* as consolidated with Brown, Czaja and Shelton as intervening plaintiffs (District Court Docket No. H-76-102) and the second in the action brought by *Brown, Czaja* and *Shelton* (District Court Docket No. H-77-657).

Insofar as is pertinent, these judgments provided that "It is therefore accordingly ORDERED and ADJUDGED that Judgment enter and hereby does enter . . . that the Connecticut Board of Pardons furnish any member of the Plaintiff class [inmates currently serving sentences of life imprisonment at the Connecticut Correctional Institution, Somers and the Connecticut Correctional Institution, Enfield] a written statement of reasons and facts relied upon when such member of the Plaintiff class is denied a pardon by the Board." (See Appendix to Petitioners' Petition For A Writ Of Certiorari, pp. 26a-27a.)

In a *per curiam* opinion, the judgments were affirmed by the United States Court of Appeals for the Second Circuit. That Court's opinion is contained in the Appendix to Petitioners' Petition For A Writ of Certiorari at p. 18a, and is reported in 593 F.2d 165 (2d Cir. 1979).

The Board of Pardons then petitioned this Court for a Writ of Certiorari. This petition was granted by this Court on June

11, 1979 and this Court ordered that "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. (1979).

The Second Circuit requested the parties to file further briefs with that Court taking into consideration this Court's opinion in *Greenholtz*. The parties filed their respective briefs, and on March 20, 1980 the Second Circuit entered the following judgment which is the basis upon which this Petition for a Writ of Certiorari was filed:

> "Upon reconsideration, we affirm our earlier conclusions that (1) the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected 'liberty' interest in the pardons process, and (2) the due process rights which attend this protected interest require that life inmates receive written explanations of adverse decisions by the Board of Pardons. We remand to the district court to determine at what point in an inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to vest him with a protected 'liberty' interest and due process rights." See Appendix to Petitioners' Petition For A Writ of Certiorari, pp. 4a-5a, *Dumschat v. Board of Pardons*, 618 F.2d 216, 217.

The Connecticut Board of Pardons Petition for A Writ Of Certiorari was granted October 14, 1980.

SUMMARY OF ARGUMENT

Members of the plaintiff-respondent class do not have such a legitimate expectation of receiving pardon relief so as to give them a protectible right in the pardoning process.

Neither the statutory authority under which the Board of Pardons operates nor the Board's prior history in granting relief to lifers warrants the conclusion that a pardon is other than an act of clemency or mercy which is plenary in character subject only to the condition that this authority may not be exercised or withheld for constitutionally impermissable reasons. Such reasons are not even claimed in this case.

Requiring a written explanation of adverse decisions to lifers who have served some, as yet undetermined portion of their sentence, not only does not comport with the rationale of previous decisions of this Court calling for similar statements but would seem to encumber, for no good reason, those states where the authority to pardon is liberally used.

ARGUMENT

I. THE PLAINTIFFS DO NOT HAVE A PROTECTIBLE RIGHT TO A PARDON.

The authority of the Board of Pardons, insofar as is relevant to this action, is provided for in Section 18-26, Conn. Gen. Stat. In material part this statute provides as follows:

> "(a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the board of pardons.
>
> (b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence."

Upon reconsideration following remand from this Court, the Court of Appeals correctly concluded that ". . . Connecticut's pardons statute contains neither a presumption in favor of pardon nor a list of factors to be considered by the Board of Pardons. Instead, the statute grants the board *unfettered discretion* in the exercise of its power . . . The statute offers only the 'mere hope' of pardon; it does not create the legitimate expectation of freedom and therefore does not implicate due process" *Dumschat*, 618 F.2d 216, 219 (Emphasis added).

Further, both the Court of Appeals and the District Court recognized that the authority of the Board which is involved in this action, is the authority to reduce the minimum term of an inmate with the result being that the inmate's eligibility to be considered for release to the community by the Connecticut

Board of Parole is accelerated. See *Dumschat*, 618 F.2d 216, 217, note 1 and *Dumschat*, 432 F.Supp. 1310, 1312.

The Connecticut Board of Parole is a separate and distinct agency from the Board of Pardons.

With regard to this paroling authority the Connecticut Supreme Court has held that:

> "The sole statute concerning parole, §54-125, simply provides that an inmate who has served his minimum sentence 'may be allowed to go at large on parole in the discretion of the panel of the board of parole for the institution in which the person is confined.' There is no statutory requirement that the panel actually consider the eligibility of any inmate for parole, the statute does not vest an inmate with the right to demand parole, and there is no statutory provision which even permits an inmate to apply for parole." *Taylor v. Robinson*, 171 Conn. 691, 697, 372 A.2d 102 (1976).

The interpretation of this statute by "[t]he highest state court is the final authority on state law . . ." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177, 61 S.Ct. 176, 178 (1940).

Even though a lifer in Connecticut can have no statutorily based expectation of being released on parole or of even being considered eligible or applying for parole (*Taylor v. Robinson*, supra) and despite its conclusion that a lifer applies for a pardon to a board with "unfettered discretion", the Court of Appeals held that:

"Upon reconsideration, we afirm our earlier conclusions that (1) the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected 'liberty' interest in the pardons process, and (2) the due process rights

which attend this protected interest require that life inmates receive written explanations of adverse decisions by the Board of Pardons. We remand to the district court to determine at what point in an inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to vest him with a protected 'liberty' interest and due process rights." *Dumschat*, 618, F.2d 216,217.

In so holding, the Court of Appeals accepted the contention of Connecticut's life inmates ". . . that they had a legitimate expectation of pardon and release - and due process rights in a pardon proceeding - by virtue of the regularity with which the Board of Pardons grants them relief." *Dumschat*, 618 F.2d at p. 219.

With regard to this "legitimate expectation" the Court noted that:

> "Though the statistical evidence provided below by state officials was not, as Judge Blumenfeld noted, 'as extensive as might be desired,' 432 F.Supp. at 1314, it was sufficient to establish that pardons are granted to Connecticut's life inmates with compelling frequency. Bernard Gates, then chairman of the Board of Parole, testified that more than 75 percent of Connecticut's 'lifers' have their eligibility for parole accelerated by the Board of Pardons. Ninety percent of these inmates are then granted parole within their first year of eligibility, and all are paroled after no more than a few years' wait." *Dumschat*, 618 F.2d 216, 219.

The Court of Appeals aslo noted that "In addition, the board grants immediate release to a number of other life inmates by cummuting their sentences to time served". *Dumschat*, 618, F.2d 219, 220.

The petitioners do not know where that observation is supported in the record. This was certainly not the finding of the District Court. The trial court found that "Although the board has the power to grant absolute pardons to inmates, that power is never employed. Instead, the board commutes an inmate's minimum sentence so as to render him eligible for parole at an earlier date. For persons sentenced to long imprisonment terms, particularly 'lifers' like plaintiff, accelerated release may often be a two-step process consisting of a commutation of their minimum sentence by the pardon board and then a parole from the board of parole." *Dumschat*, 432 F.Supp. 1310, 1312.

The conclusion that a "lifer" at some point in his sentence, acquires a "protectible liberty interest" is in conflict with this Court's opinion in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct., 2100, 60 L.Ed.2d 668 (1979).

In *Greenholtz* this Court held that:

"The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process we have inquired into the nature of the individual's claimed interest.

> '[T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake . . . .' Board of Regents v. Roth, 408 U.S. 564, 570-571, 92 S.Ct. 2701, 2705-2706, 33 L.Ed.2d 548 (1972).

This has meant that to obtain a protectible right

> 'a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expecta-

> tion of it. He must, instead, have *a legitimate claim of entitlement to it.*' Id., at 577, 92 S.Ct. at 2709.

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.' Meachum v. Fano, 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1977)." (Emphasis added) 442 U.S. at page 7, 99 S.Ct., at pp. 2103-2104.

When one considers the vast discretion vested in the Board of Pardons, it is impossible to see how a "lifer" can acquire and hold to "a legitimate claim of entitlement" to a pardon.

The "lifers" expectation of obtaining a pardon is comparable to that of a prisoner in remaining at a particular institution. It is simply ". . . too ephemeral and insubstantial to trigger procedural due process proctections . . ." *Meachum v. Fano*, 427, U.S. 215, 228, 96 S.Ct., 2532, 2540, 49 L.Ed.2d, 451 (1976).

In basing its conclusions upon the history of the Board in granting pardons to "lifers" such as that history appears in the record, the Court of Appeals attached constitutional significance to percentages not deemed of such importance even by other panels of the Second Circuit.

In *Pugliese v. Nelson*, 617 F.2d 916, 923, (2d.Cir. 1980) another panel of the Court of Appeals considered prior decisions of that Circuit in light of *Greenholtz* and concluded that:

> "Equally important for our purposes is the Supreme Court's recent holding in Grenholtz, that a lawfully

> imprisoned convict's interest in the possibility of being released on parole prior to expiration of the term of his sentence does not entitle him to due process protection, absent the creation of a regulatory system giving him a right to claim parole release upon meeting certain conditions. Prior thereto we had taken the oppisite view in United States ex rel. Johnson v. Chairman of New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974), based mainly on the fact that the prisoner's interest in parole, though only an expectation, was emormous, representing as it does 'the difference between incarceration and conditional liberty' *and that most prisoners–more than 70%–were in fact customarily released on parole. In our view, that rendered the interest far from an ephemeral expectation. In light of Greenholtz, however, United States ex rel. Johnson no longer represents the law.* Booth v. Hammock, 605 F.2d 661 (2d Cir. 1979)." (Emphasis added)

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578, 92 S.Ct. 2701, 2710, 33 L.Ed.2d 548 this Court did not regard the suggestion "that most teachers hired on a year-to-year basis by Wisconsin State University—Oshkosh are, in fact, rehired" to be of sufficient import to infer the presence of "a legitimate claim of entitlement" to be rehired. (See Roth, supra. footnote 6.)

With regard to this Court's opinion in *Greenholtz*, the Second Circuit held that in basing their conclusion on the Board's history "We find nothing in Greenholtz that precludes this holding." 618 F.2d at p. 220. In so doing, the Second Circuit rejected the claim of the petitioners that Greenholtz does preclude such a holding. (footnote 16)

In *Greenholtz*, similar statistics were available to this Court, by virtue of the certified record, for the District Court

had included in its decision a table showing numbers of inmates eligible for discretionary parole and the number who obtained it. *Inmates of Nebraska Penal and Correctional Complex v. Greenholtz*, 436 F.Supp. 430 (1976) table at 439.

Simple calculation shows that among Caucasians, Blacks and Mexicans eligible for discretionary parole approximately sixty percent of each group achieved release. Thus, if local Board practice which resulted in a statistical showing that it was more likely than not, that one would achieve discretionary parole were a sufficient basis for a protected liberty interest then this Court would have so found in *Greenholtz*.

Instead, this Court found "That the State holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained." *Greenholtz*, supra, 442 U.S. 11, 99 S.Ct., 2105. (Court's emphasis).

That Connecticut may grant a slightly higher percentage of reduced terms to lifers through its pardons process than Nebraska does discretionary paroles through its parole process is not constitutionally significant, There is no basis upon which to draw a constitutional line at seventy-five percent.

In any event, as "Judge Henry Friendly cogently noted . . . '[T]here is a human difference between losing what one has and not getting what one wants.' Friendly, 'Some Kind of Hearing', 123 U.Pa.L.Rev. 1267, 1296, (1975)." *Greenholtz*, supra, 442 U.S. 10, 99 S.Ct., 2105.

The life inmate in Connecticut who is denied a reduction in his minimum term is not in the situation of losing what he has but rather in the situation of not getting what he wants.

Even the Court's rationale for requiring "written explanations of adverse decisions" seems to contradict its conclusion with regard to a "legitimate expectation."

This rationale is that "The need to give reasons encourages fair and thoughtful deliberations by the board, thus protecting against arbitrary and constitutionally impermissable decisions. Moreover, it promotes consistency, an important consideration in light of the board's frequent changes in personnel.[9] [Thirteen different people sat on the five person board between November 1973 and November 1976.] Finally, it helps inmates to correct misunderstandings by the board or to remedy their own behavioral or other problems which influenced the board's denial of relief." *Dumschat*, supra, 618 F.2d, 221.

It is respectfully claimed that it is simply inconsistent to say that a lifer, at some point in his sentence, acquires a constitutionally protected legitimate expectation of relief from the Board because of the Board's history in dealing with lifers and at the same time, justify the constitutional relief given on the grounds that this relief "encourages fair and thoughtful deliberations . . ." and that it "protect[s] against arbitrary and constitutionally impermissable decisions" and that it "promotes consistancy" and that it "corrects misunderstandings."

Putting the Board's statutorily "unfettered discretion" aside, since the Court feels that the administrative process itself is subject to such defects, and in this regard the petitioners do not concede this to be the case, then one has to wonder how a lifer could have any expectation of favorable action from a Board whose history of prior decisions upon which that expectation is premised, has been and presumably will continue to be so influenced by chance.

II. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IS ALSO IN CONFLICT WITH THIS COURT'S OPINION IN *SCHICK V. REED.*

This conclusion of the Second Circuit of a "liberty interest" is contrary to the opinion of this Court in *Schick v. Reed*, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974).

In *Schick* this Court dealt with the authority of the President to ". . . have Power to grant Reprieves and Pardons for Offenses against the United States, except in Case of Impeachment." Article 2, Section 2, Clause 1, United States Constitution.

In *Schick* this Court characterized one who seeks a pardon as a ". . . person who *petitions for mercy* . . . " *Schick*, supra, 419 U.S. 267, 95 S.Ct. 385 (emphasis added).

In *Schick*, this Court considered the origins of the President's pardoning power and observed the following:

> "At the time of the drafting and adoption of our Constitution it was considered elementary that the prerogative of the English crown could be exercised upon conditions:
>
> 'It seems agreed, That the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend.' 2 W. Hawkins, Pleas of the Crown 557 (6th ed. 1787)." *Schick*, supra, 419 U.S. 261, 95 S.Ct. 382.

This Court then went on to hold that:

> "The history of our executive pardoning power reveals a consistent pattern of adherence to the English common law practice." *Schick*, supra, 419 U.S. 262, 95 S.Ct. 383.

This Court further held that "The plain purpose of the broad power conferred by Section 2, cl. 1, was to allow *plenary* authority in the President to *'forgive'* the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with *conditions which are in themselves constitutionally unobjectionable.*" *Schick*, supra, 419 U.S. 266, 95 S.Ct. 385. (Emphasis added).

Thus, since the pardoning power is "plenary" subject only to the attachment of conditions which are constitutionally unobjectionable then the denial of a pardon must be "plentary" subject only to the condition that a denial may not be based upon constitutionally impermissable reasons. There is no claim in this case that the denial was based upon constitutionally impermissable reasons.

If the Connecticut Board of Pardons were required to state reasons for denying relief, then it would seem inescapable that the President of the United States in denying pardon relief would similarly be required to state his reasons. Such a conclusion seems ridiculous on its face.

So long as the Board does not deny a pardon for a constitionally impermissable reason there is no statement which it could give which would serve any purpose. It is impossible to conceive of a situation wherein any court absent the denial of a pardon because of the applicant's race, religion, etc. would overrule a Pardon Board decision to deny clemency.

III. THE PLAINTIFFS DO NOT HAVE A RIGHT TO WRITTEN EXPLANATIONS OF ADVERSE DECISIONS.

The Court of Appeals concluded, in part that "Nothing in *Greenholtz* requires us to overrule Judge Blumenfeld's determination regarding the requirements of due process in this case. In fact, dicta in *Greenholtz* suggests support for Judge Blumenfeld's conclusion", *Dumschat*, 618 F.2d at p. 221.

The Court of Appeals then quoted from that portion of this Court's opinion in *Greenholtz* which stated that "[W]hen parole is denied [the board] informs the inmate in what respects he falls short of qualifying for parole; *this affords the process that is due under these circumstances*." *Dumschat*, 618 F.2d at p. 222, emphasis supplied by the Court of Appeals.

This statement from *Greenholtz*, of course, must be read in the context of this Court's acceptance of the "view that the expectancy of release provided in [the Nebraska statute] is entitled to some measure of protection." *Greenholtz*, supra, 411 U.S. at p. 12, 99 S.Ct. at p. 2106.

This "expectancy of release" is precisely what is absent from Sec. 18-26, Connecticut General Statutes and this absence was noted by the Court of Appeals as has been discussed above. Unlike the Nebraska statute in *Greenholtz*, by no stretch of the imagination can the Connecticut Statute be construed as providing that the inmate "shall" obtain release "unless" some designated reason is found.

The Second Circuit has itself recognized the pivotal role which the "uniqueness" of the Nebraska statute played in the majority opinion in *Greenholtz*. See *Boothe v. Hammock*, 605 F.2d 661, 663-664 (1979).

There is simply no basis either in statutory provisions or administrative practice to find a "legitimate expectation" that

a "lifer" in Connecticut "shall" obtain pardon relief unless some disqualifying condition arises.

Nor is this case similar to other cases wherein this Court ordered a written explanation from an administrative agency. See *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d. 484 (1972) wherein such statement was predicated upon the fact that a parolee enjoys numerous benefits and "has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions [and] [i]n many cases . . . faces lengthy incarceration if his parole is revoked." *Morrissey*, supra, 404 U.S. p. 482, 92 S.Ct. 2601 and *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 11 L.Ed.2d 935, wherein such statement was based upon the fact that "the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior", *Wolff*, supra. 418 U.S. p. 557, 94 S.Ct. 2975.

Even if the Connecticut Board of Pardons may be liberal in the exercise of its authority, its record, such as it appears, can hardly be interpreted as conveying the message to anyone that he "shall" be pardoned or that he can enjoy the certainty of this act of clemency coming to him unless he disqualifies himself by his conduct.

In fact, if one regards the pardoning process as a socially useful instrument then it is difficult to understand the burdening of this process only because of its liberal use.

Certainly the rationale of the Court of Appeals, turning as it does on the attitudes, philosophies and personalities of board members would result in the applicability of due process differing from state to state and even in the same state as membership changes.

This rationale would seem to require the conclusion that a written explanation is *not* required where prior history showed infrequent use of this authority.

CONCLUSION

The judgment of the Court of Appeals should be reversed and action remanded to the District Court for the entry of judgment for the petitioners-defendants.

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CERTIFICATION

This is to certify that on this 28th day of November, 1980, three copies of Brief For Petitioners and Joint Appendix were mailed, postage prepaid, to Stephen Wizner, 127 Wall Street, New Haven, Connecticut, counsel for the Respondents.

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